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No. 14-981

In The
Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* INDIANA TECH LAW SCHOOL AMICUS PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae Indiana Tech Law School Amicus Project ("Amicus Project") strives to assist the Court in arriving at decisions that promote equal protection of the law.[1] The Amicus Project respectfully submits that this case presents the Court with an opportunity to guide universities in developing narrowly-tailored affirmative action programs that achieve educational diversity, promote equality of opportunity, and enhance the educational experience for students of all backgrounds.

FACTUAL BACKGROUND

The University of Texas at Austin (the "University") grants automatic admission to students who graduate from the top ten percent of their high school classes (the "Top Ten Percent Program"). The University also uses an Academic Achievement Index ("AAI") to admit applicants who are not in the top ten percent of their high school classes, but who possess extremely

[1] Counsel for Petitioner Abigail Noel Fisher and Respondents the University of Texas at Austin consented to the filing of this brief, and counsel for both parties also submitted written consent to the filing of briefs in support of either party or neither party. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, its law school, or its counsel made a monetary contribution to this brief's preparation or submission.

high SAT scores and grade point averages. Finally, the University uses a holistic review process that considers an applicant's AAI and Personal Achievement Index ("PAI"). Until 2005, the PAI was calculated based on weighted scores on two required essays and factors including, but not limited to, leadership qualities, extracurricular activities, work experience, community service, socioeconomic status, and family responsibilities.

In 2005, two years after this Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the University revised its affirmative action policy to include race in the holistic review process.[2] The question before the Court is whether the inclusion of race in the University's holistic review process is narrowly tailored to achieve educational diversity. *See Bakke v. Regents of the University of California*, 438 U.S. 265, 311-12 (1978) ("the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education"); *see also Grutter*, 539 U.S. at 330 ("classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when students have "the greatest possible variety of backgrounds") (internal citations omitted).

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[2] Before 2003, the University was prohibited from facially considering race in the admissions process. *See Hopwood v. Texas*, 78 F. 3d 932 (5th Cir. 1996), *abrogated by Grutter*, 539 U.S. at 343.

For the reasons set forth below, the answer should be no.

SUMMARY OF ARGUMENT

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 748 (2007).

The University's affirmative action program rests on an inherent and irreconcilable contradiction. The Top Ten Percent Program results in the admission of a substantial number of qualified minority applicants *by not focusing on race at all*. Yet, the University asks this Court to hold that the *inclusion* of race in its holistic review process is narrowly tailored and necessary to achieve educational diversity. The facts suggest otherwise, and a "careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications," need only look to the University's Top Ten Percent Program to conclude that the University's holistic review process is not narrowly tailored. *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2420 (2013).

In 2008, the year in which Petitioner was denied admission to the University, 21.5% of the students admitted through the University's Top Ten Percent Program were minorities, many of whom graduated from segregated high schools and "were able to excel

in the face of severe limitations in their high school education." *Fisher v. University of Texas at Austin*, 758 F. 3d 633, 650-51, 653 (5th Cir. 2014) (the "Top Ten Percent Plan gains diversity from . . . [t]he de facto segregation of schools in Texas [and] enables the Top Ten Percent Plan to increase minorities in the mix") (brackets added); *see also Bakke*, 438 U.S. at 367 (affirmative action programs assist applicants who are "disadvantaged by the effects of past discrimination"). In the University's holistic review process that year, 216 African-American and Hispanic students – 0.9% and 2.4% of the total applicant pool – gained admission to an incoming class of 6,322. *See id.* at 668 (Garza, J., dissenting).

Given the Top Ten Percent Program's success in creating diversity absent any consideration of race, the University must explain why including race in the holistic review process is nonetheless "'necessary' . . . to achieve the educational benefits of diversity," and must reconcile its policy with the mandate that schools consider "contributions to diversity *beyond race*." *Fisher*, 133 S. Ct. at 2420 (*quoting Bakke*, 438 U.S. at 305); *Fisher*, 758 F. 3d at 651 (emphasis added). The University's stated goal of improving the "quality of minority enrollment" fails in this regard. *Fisher*, 758 F. 3d at 669 (Garza, J., dissenting). Instead, the University's justification makes painfully clear that, whether wittingly or not, the inclusion of race in the holistic review rests on an understanding that African-American and Hispanic applicants admitted through the Top Ten Percent Program are "inferior."

As Judge Garza stated in his dissent, the University's holistic review process is based on the factually unsupported assumption that "minority students from majority-minority Texas high schools are inherently limited in their ability to contribute to the University's vision of a diverse student body." *Id.* at 670. This assumption is laden with the very stereotypes of African-American and Hispanic applicants that haunted the Jim Crow era, and "embraces the very ill that the Equal Protection Clause seeks to banish." *Id.* At bottom, the University's argument simply cannot be reconciled with the core purpose of affirmative action, which is to promote "values beyond race alone, including enhanced classroom dialogue and the *lessening of racial isolation and stereotypes*." *Fisher*, 133 S. Ct. at 2418 (emphasis added).

Ironically, the University's affirmative action program actually fuels the fire generated by the already existing racial tensions between African-Americans and Caucasians by promoting intra-racial stereotyping and validating an insidious notion of intra-racial inferiority – all under the guise of affirmative action. This is certainly not the way to stop discriminating on the basis of race. On these facts, to hold that the University's program is narrowly tailored would be to render strict scrutiny "strict in theory but feeble in fact." *Fisher*, 133 S. Ct. at 2421.

The University's inability to fashion a workable affirmative action plan, coupled with the undesirable consequences of what it no doubt believed was a fair attempt at creating diversity, are directly linked to,

and underscore, a deeper problem: *Grutter's* concept of "critical mass." The "critical mass" concept is fundamentally inconsistent with *Bakke*, which "is not simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.'" *Grutter*, 539 U.S. at 329 (*quoting Bakke*, 438 U.S. at 307). *Bakke* recognized that skin color is only a single, albeit significant, element of educational diversity, and eschewed a focus on achieving a specific *number* of minority students. *See Bakke*, 438 U.S. at 315. The "critical mass" standard, on its own terms, shifts the focus to numbers and skin color rather than individual factors such as socioeconomic status, family responsibilities, and a history of overcoming adversity, that transcend race and enrich the educational experience for students of all backgrounds.

Ultimately, by abandoning a disproportionate emphasis on race, universities can finally begin to focus on what individuals have overcome, and not on what they cannot change. The University's affirmative action program fails to advance this principle, and in so doing violates the Equal Protection Clause. For these reasons, the Fifth Circuit's decision should be reversed.

ARGUMENT

I. The University Of Texas At Austin's Affirmative Action Program Is Not Narrowly Tailored To Achieve Educational Diversity.

Race-conscious affirmative action programs are permissible only when "necessary and narrowly tailored to further a compelling governmental interest." *Fisher*, 758 F. 3d at 664 (Garza, J., dissenting). Courts must examine whether there is "a close 'fit' between this goal [achieving a critical mass of diversity] and the admissions program's consideration of race." *Id.* at 666 (Garza, J., dissenting) (brackets added). Furthermore, courts "must give 'no deference,' to a state actor's assertion that its chosen 'means . . . to attain diversity are narrowly tailored to that goal.'" *Id.* at 665 (*quoting Fisher*, 133 S. Ct. at 2420). The University's affirmative action program is neither necessary nor narrowly tailored.

A. The Top Ten Percent Program Already Admits a Substantial Number of Minority Applicants Without Considering Race.

In *Parents Involved in Community Schools v. Seattle School District Number 1*, the Court held that "the minimal impact of . . . racial classifications on school enrollment casts doubt on the necessity of using racial classifications." 551 U.S. at 734. The University's affirmative action program creates such doubt because its use of race has only a *de minimus* impact on minority admissions.

As stated above, in 2008, the year in which the University denied admission to Petitioner, 21.5% of applicants admitted through the Top Ten Percent Program were African-American and Hispanic. Conversely, the University's holistic review process, which since 2005 had included race as a factor in calculating the PAI, only accounted for 2.4% and 0.9% of Hispanic and African-American enrollment, or 216 African-American and Hispanic students out of an entering class of 6,322. *See Fisher*, 758 F. 3d at 668 (Garza, J., dissenting). Thus, the vast majority of incoming minority students, many of whom come from largely segregated high schools, already are chosen through *race-neutral means*. *See Fisher*, 758 F. 3d at 650-51.

Because the University admits a fraction of its minority students through the holistic review process, it must explain "how a small, marginal increase in minority admissions is necessary to achieving its diversity goals." *Id.* at 668 (Garza, J., dissenting); *Seattle School Dist. No. 1*, 551 U.S. at 790 (Kennedy, J., concurring) ("the small number of assignments affected suggests that the schools could have achieved their stated ends through different means"). The University offers no such explanation.

B. The University's Inclusion of Race in Its Holistic Review Rests on Racial and Ethnic Stereotypes Regarding the Quality of Applicants Admitted Through the Top Ten Percent Program.

The University's objective when including race in the holistic review process was to achieve qualitative diversity or "diversity within diversity." *Fisher*, 758 F. 3d at 669 (Garza, J., dissenting). This objective rests on a qualitative *assumption* that minority applicants admitted through the Top Ten Percent Program "are somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review." *Id.* at 669-70.

Yet, the University has failed to explain why minority applicants admitted through holistic review are somehow more qualified than those admitted through the Top Ten Percent Program. For example, the "record [did] not indicate that the University evaluate[d] students admitted under the Top Ten Percent [Program], checking for indicia of qualitative diversity . . . before determining that race should be considered in the holistic review process to fill the remaining seats in the class." *Id.* at 670-71 (brackets added). Judge Garza stated as follows:

> The University has not shown that qualitative diversity is absent among the minority students admitted under the race-neutral Top Ten Percent [Program]. That is, the University does not evaluate the diversity present in this group before deploying racial

> classifications to fill the remaining seats. The University does not assess whether Top Ten Percent Law admittees exhibit sufficient diversity within diversity, whether the requisite "change agents" are among them, and whether these admittees are able, collectively or individually, to combat pernicious stereotypes. There is no such evaluation despite the fact that Top Ten Percent Law admittees also submit applications with essays, and are even assigned PAI scores for purposes of admission to individual schools. *Id.* at 669 (brackets added).

Further, the "University never explain[ed] how the various factors [in the PAI] are measured, the weight afforded to each, and what combination thereof would yield a 'critical mass' of diversity sufficient to cease use of racial classifications." *Id.* at 673 (brackets added). Thus, "even accepting the University's broad and generic qualitative diversity ends," the University has failed to demonstrate that its race-conscious policy is necessary to achieve educational diversity. *Id.* at 669.

Notwithstanding, the Fifth Circuit "firmly adopt[ed]" the University's assumption that "minority students from majority-minority Texas high schools are inherently limited in their ability to contribute to the University's vision of a diverse student body." *Id.* at 670. Even worse, the Fifth Circuit's reliance on the re-segregation of some Texas school districts as indicative of lesser-qualified students was "premised on the dangerous assumption that students from those

districts (at least those in the top ten percent of each class) do not possess the qualities necessary for the University of Texas to establish meaningful campus diversity." *Id.* (internal citations omitted); *see also Richmond v. J.A. Croson*, 488 U.S. 469, 500 (1989) (unless classifications based on race are "strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility").

In this way, the Fifth Circuit "engage[d] in the very stereotyping that the Equal Protection Clause abhors." *Fisher*, 758 F. 3d at 670 (Garza, J., dissenting) (brackets added); *see also Rice v. Cayetano*, 528 U.S. 495, 517 (2000) ("[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people"); *Croson*, 488 U.S. at 493 (there must be "little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype"); *cf. U.S. v. Virginia*, 518 U.S. 515, 541 (1996) (states may not enact laws that rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females," particularly when the states control the "gates to opportunity"); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group").

Moreover, if, as the University argues, its holistic review process "allows it to select for 'other types of diversity' beyond race alone," *Fisher*, 758 F. 3d at 669

(Garza, J., dissenting), what possible justification supports *including* race as a factor in that process, particularly when the University admits a substantial number of minority applicants through its Top Ten Percent Program? The justification is rooted in impermissible racial and ethnic stereotyping, that minorities from segregated schools are not as qualified as those attending predominantly white high schools and living in affluent neighborhoods. Even the most ardent supporters of affirmative action would not countenance such a blatant example of masking racial and ethnic stereotyping with "benign" motives.[3] This is precisely why racial classifications are "too pernicious to permit any but the most exact connection between justification and classification." *Seattle School Dist. No. 1*, 551 U.S. at 720 (*quoting Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)) (*quoting Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980)) (Stevens, J., dissenting).

The University attempts to further justify race-infused holistic review by arguing that "a limited use of race is necessary to target minorities with unique

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[3] The fact that such stereotypes are now used to include rather than exclude, minorities does not matter. *See Fisher*, 133 S. Ct. at 2421 ("the analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable") (*quoting Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, n. 9 (1982)); *see also Croson*, 488 U.S. at 500 ("the analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable").

talents and *higher test scores* to add the diversity envisioned by *Bakke* to the student body." *Fisher*, 758 F. 3d at 657 (emphasis added). Even assuming *arguendo* that modest differences in SAT scores suggest qualitative differences between applicants, a fact relied on by the Fifth Circuit when upholding the University's affirmative action program,[4] this provides no legal basis upon which to engage in racial and ethnic stereotyping. *Cf. J.E.B. v. Alabama*, 511 U.S. 127, 139 (1994) ("We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization"); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) (invalidating a stereotype-based classification even though the underlying generalization was "not entirely without empirical support"). Furthermore, it seems odd that the purpose for which holistic review is deemed so vital – to consider factors such as leadership qualities, extracurricular activities, work experience, community service, socioeconomic status, and family responsibilities – is driven by an artificial focus on SAT scores.

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[4] For example, from 2003-2007 African-Americans admitted through the PAI scored, on average, 29 points higher on the SAT than those admitted through the Top Ten Percent Program. Hispanics admitted through the AAI and PAI programs scored on average, 65.6 points higher on the SAT than those admitted through the Top Ten Program. *See Fisher*, 758 F. 3d at 650.

The defects in the University's affirmative action program are inextricably linked to the ambiguities caused by *Grutter's* "critical mass" concept. By adding race to the holistic review process, the University is seeking to increase not only the quality, but the number of minority students who are admitted. Nowhere is this more evident than in the University's argument that one goal of holistic review is the "dispersion of minority students among many classes and programs." *Fisher*, 758 F. 3d at 658. To achieve this goal requires the University to focus on numbers, and to create a race-conscious holistic review process that is predicated on racial and ethnic stereotyping.

This approach turns *Bakke* on its head, as "the purpose of affirmative action is not simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.'" *Grutter*, 539 U.S. at 329-30 (*quoting Bakke*, 438 U.S. at 307). Indeed, the educational benefits of diversity encompass "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke*, 438 U.S. at 315. As Justice Powell stated in *Bakke*, "[i]t is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups." *Id.*

At bottom, to hold that the University's affirmative action program is narrowly tailored would require this Court to countenance the stereotyping of African-American and Hispanic applicants *based* on

their socio-economic status, *based* on the fact that they graduated from segregated schools, and *based* on the disadvantages they face due to past discrimination. This would make *Brown v. Board of Education*, 347 U.S. 483 (1954), seem like an advisory opinion, and make it difficult, if not impossible, to stop discriminating on the basis of race. For these reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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